No. 33460

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

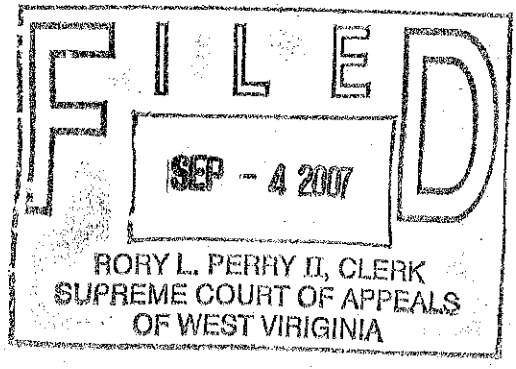
JOHNNIE HOOVER,

Appellant ,
Plaintiff Below,

v.

PETER K. MORAN

Appellee,
Defendant Below.



Appeal from the Circuit Court of
Kanawha County, West Virginia
Case No. 02-C-1058

BRIEF ON BEHALF OF APPELLANT JOHNNIE HOOVER

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v.

Civil Action No. 02-C-1058
Irene C. Berger, Circuit Judge
Thirteenth Judicial Circuit

PETER K. MORAN,

Appellee,
Defendant Below.

BRIEF ON BEHALF OF APPELLANT JOHNNIE HOOVER

I. KIND OF PROCEEDING AND NATURE OF RULING IN LOWER TRIBUNAL

This is a civil action wherein Appellant Johnnie Hoover ("Appellant Hoover") seeks specific performance of an oral contract between Appellant Hoover and Appellee Peter K. Moran ("Appellee Moran"), President and Chief Executive Officer of Princess Beverly Coal Company ("Princess Beverly"). By Agreed Order entered March 29, 2004, Princess Beverly was dismissed as a defendant from this action, with prejudice.

Appellant Hoover appeals herein the judgment rendered in the Circuit Court of Kanawha County on January 2, 2007, which denied the "Motion of Johnnie Hoover for Reconsideration of Order Granting Defendant, Peter K. Moran's Motion to Dismiss."

II. FACTS OF THE CASE

Appellant Johnnie Hoover was employed by Princess Beverly Coal Company as a union miner from July 12, 1984 through February 29, 2000. He worked at the Cabin Creek, West Virginia coal mine

as a mechanic, welder and equipment operator. For a period of time, at least during the mid-1980's until the early 1990's, Princess Beverly experienced financial difficulties, wherein the coal company had a hard time meeting its payroll and in purchasing equipment, materials, parts and supplies on credit.[1] (*See* "Plaintiff's Response To And Memorandum In Opposition To Defendants' Motion To Dismiss," Plaintiff's Affidavit, ¶¶ 1-2)

On or about February 5, 1985, Appellee Moran, then President of Princess Beverly, approached Appellant Hoover "and asked if he could borrow $20,000 to pay the company's real estate taxes on property it owned in Greenbrier County." *Id.*, ¶3. Although Appellant Hoover did not know why he, an employee, was asked to make such a loan, he nevertheless agreed, as evidenced by cancelled check number 118, dated February 5, 1985, made payable to "Princess Beverly Coal Co.," drawn on Appellant Hoover's personal checking account at the Home National Bank, Sutton, West Virginia. The loan was to be repaid in sixty days and was purportedly secured by a D-8K Dozer, pursuant to the promissory note written on the company's letterhead, also dated February 5, 1985, and executed by Paul K. Moran, Vice President. *Id.*, ¶¶ 3-4. (Copies of the cancelled check and promissory note are attached to Plaintiff's Affidavit as Exhibits 1 and 2.)

According to Appellant Hoover's Affidavit, Appellee Moran informed him, a few days before the $20,000 loan was to be repaid, that "the company did not have the money to repay the loan on time and asked for an extension."[2]

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[1] Appellant Hoover stated in his Affidavit that the coal company's loss of credit was at least in part due to the withholding of financial backing by Lawson Hamilton, a principal of the company. *Id.*, ¶ 6

[2] Ultimately, the $20,000 loan was paid back in installments, "with the final payment being made two

Appellant Hoover further stated in his Affidavit, as follows:

> Peter Moran also asked your affiant if he was willing to continue to make loans of cash and equipment to the company as needed and to purchase parts for use by the company. In exchange for the extension of the due date on the promissory note and the agreement by your affiant to make his personal funds available for use by the company to buy parts and equipment necessary to its ongoing operation, Peter Moran stated that he would pay your affiant 10% of the sale price of the company if and when it was sold. Peter Moran further promised your affiant that all company profits would be put back into the company and that, if your affiant worked together with him, the company would make it. Your affiant agreed to these terms.

Id., ¶ 5

Subsequently, under the terms of the parties' oral agreement, and as evidenced by the course of dealings between Appellant Hoover and Appellee Moran, Appellant Hoover made his personal funds available as a *de facto* line of credit. Accordingly, in the Spring of 1985, Appellant Hoover used his personal funds to buy parts for the Cabin Creek coal company's equipment at various parts suppliers, namely Industrial Rubber & Supply and Persinger Supply, in Charleston, and the NAPA Store, in Marmet. *Id.*, ¶ 8

Appellant Hoover estimated that he spent an average of between $6,000 and $8,000 per month from his own personal funds, over a two to three year period, purchasing parts for the company, and further described the "procedure" as follows: ". . . as parts were needed, he (Appellant Hoover) would go to suppliers and buy the parts with his own personal funds. Your affiant would then would give the sales receipts to Peter Moran, who would in turn would forward them to the company's accounting office. Your affiant would eventually be reimbursed by the accounting office." *Id.*, ¶ 9

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to three years after the loan was first made." *Id.*, ¶ 7.

Pursuant to Appellant Hoover's Affidavit, he used his own personal funds to purchase the following equipment and services for the coal company's use:

A. a dozer blade and a Caterpillar model 773 rock truck bed purchased from another southern West Virginia coal company;

B. a rotary drill from Crown Hill Equipment was purchased for $7,000 and was utilized by the company for parts in its drills;

C. a Caterpillar 14 B Grader was purchased on or about November 8, 1988 for $3,180, which the coal company was to have rented from Appellant Hoover; however Appellant Hoover sold the grader after two or three years when no rental payments were made by the company;

D. Appellant Hoover used his own personal truck on a regular basis, or made it available to other company employees, for trips to purchase parts and equipment for the company; he was reimbursed with diesel fuel from the job site, but was not reimbursed for wear and tear to his vehicle, and

E. Appellant Hoover arranged and paid for the services of Summersville welder, Jim Green, on at least three occasions, for equipment repairs.[3]

Id., ¶ 10

Additionally, Appellant Hoover made a loan to Appellee Moran in the amount of $10,000 on March 28, 1986, as evidenced by cancelled check number 1330, which was made payable to "Pete Moran" and drawn on Appellant Hoover's personal checking account at the Home National Bank, Sutton, West Virginia. No promissory note was executed evidencing this loan; however, Appellant Hoover wrote "two month loan" on the face of the check. This loan was never repaid. Pursuant to his Affidavit, Appellant Hoover "does not know for what purpose these funds were borrowed or whether it was a loan

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[3] Pursuant to Items A, B and E, Appellant Hoover was eventually reimbursed by the coal company for the purchases of the dozer blade, Caterpillar model 773 rock truck bed and the rotary drill, as well as for the cost of Jim Green's welding services.

to the company by Peter Moran." *Id.*, ¶ 11. (A copy of the check is attached to Appellant Hoover's Affidavit as Exhibit No. 3.)

Later that year, on August 7, 1986, Appellant Hoover loaned Appellee Moran $2,000, as evidenced by cancelled check number 1445, which was made payable to "Pete Moran," and was also drawn on Appellant Hoover's personal checking account at the Home National Bank, Sutton, West Virginia. According to Appellant Hoover's Affidavit, the loan purportedly was secured by an International single-axle dump truck, which was utilized by the coal company. This truck was later sold by Appellee Moran, but the $2,000 loan was never repaid. *Id.*, ¶ 12. (A copy of the check is attached to Appellant Hoover's Affidavit as Exhibit No. 4.)

Then, on January 4, 1991, Appellant's wife, Sharon A. Hoover, made check number 1834 payable to Home National Bank in the amount of $14,510, with the notation, "Fuel Truck/Mountain Mart Lumber" on the face of the check. Appellant Hoover used this money to buy a 1985 GMC fuel truck for the company, which was titled in the company's name. The Affidavit relates that the coal company repaid this loan "in a few months." *Id.*, ¶ 13. (A copy of the check is attached to Appellant Hoover's Affidavit as Exhibit No. 5.)

Appellant Hoover's Affidavit further provides that in September, 1994, he bought two Caterpillar model 773 rock trucks for the coal company to use in cleaning sediment ponds. Pursuant to the Affidavit, the company used both trucks for "at least a year without payment of rent." The company subsequently purchased one of the trucks from Appellant Hoover; however, the second truck "was used for another year without payment of any rent." *Id.*, ¶ 14.

Moreover, Appellant Hoover loaned the coal company approximately $10,000 to $12,000 on one occasion "to meet its payroll during a time when it could not meet its payroll obligations." The loan was subsequently repaid by the coal company, according to the Affidavit. *Id.*, ¶ 15.

Pursuant to the Affidavit, for several years Appellant Hoover "furnished to the company without cost a hydraulic air compressor for a grease truck and a steam genny." *Id.*, ¶ 16.

Appellant Hoover asserts in his Affidavit that for a period of several years, "Peter Moran sent him to sales of used equipment with a letter of credit backed by your affiant's personal checking account. Any purchases made at such sales were solely for the benefit of the company." *Id.*, ¶ 17.

Appellant Hoover states in his Affidavit that "but for the oral agreement with Peter Moran, he was under no obligation to perform the aforesaid acts." *Id.*, ¶ 18. Indeed, Appellant Hoover asserts that "but for his acts in using his personal funds to purchase parts, equipment and services to make loans, all of which acts were solely for the benefit of the company, the company would not have been able to stay in business." *Id.*, ¶ 19. Importantly, according to Appellant Hoover, neither Appellee Moran nor Princess Beverly "ever declined, rejected or objected to your affiant's use of his own personal funds to make loans to and to purchase parts, equipment and services for the company." *Id.*, ¶ 22.

Moreover, pursuant to the Affidavit, the acts set forth above, wherein Appellant Hoover made his personal funds available to the coal company, "constituted a business relationship outside the normal relationship between employer and employee." *Id.*, ¶ 19. The Affidavit further stated, as follows:

> ...[A]ll acts performed (by Appellant Hoover) were done in reliance on the promise by Peter Moran that he would receive 10 % of the sale price if the company were ever sold. Throughout the time that your affiant was making his personal funds available to the company, Peter Moran told him that the company was going to be sold and that your affiant further believed that he would be given 10 % of the sale price. *Id.*

According to Appellant Hoover's Affidavit, on or about February 13, 1997, Appellee Moran offered to settle Appellant Hoover's interest in Princess Beverly by paying him $20,000 per year for 20 years, and would also provide him with health insurance for 20 years.[4] Appellant Hoover agreed to accept this offer "on the condition that it was reduced to writing and signed by Peter Moran."[5]

However, on or about February 17, 1999 – about four days after Appellee Moran made the offer of settlement to Appellant Hoover – Appellee Moran called Appellant Hoover and advised him that Princess Beverly "was being sold and that the said agreement they had reached on or about February 13, 1997 was not going to be executed." *Id.*, ¶ 24.

According to his Affidavit, Appellant Hoover states that "sometime in February, 1999," Princess Beverly was sold to AEI Holding Resources Inc. for $11,600,000. *Id.*, ¶ 25.

The case *sub judice* arises from Appellant Hoover's claim, as set forth in his Affidavit, that "the company and Peter Moran have breached their side of the agreement reached in April, 1985, by failing and/or refusing to pay your affiant his promised 10 % of the sale proceeds from the sale of Princess Beverly Coal Company." *Id.*, ¶ 26.

Accordingly, Appellant Hoover filed his Complaint on April 16, 2002, naming Princess Beverly Coal Company and Peter K. Moran as Defendants, to which they jointly filed a Motion to Dismiss, with

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[4] According to the Affidavit, the health insurance was valued by Appellee Moran at $1,000 per month. *Id.*, ¶ 23.

[5] Payments pursuant to Appellee Moran's offer were to commence after the coal company paid Appellant Hoover "all accrued vacation and overtime pay," which Appellant Hoover and Appellee Moran agreed "would be paid at his regular rate of pay equivalent to two years at 40 hours per week." *Id.*, ¶ 23.

accompanying memorandum of law, pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure on July 30, 2002. Appellant Hoover filed his response to the Motion to Dismiss on September 4, 2002. Former Defendant Princess Beverly replied to Appellant Hoover's response to the Motion to Dismiss on November 13, 2002. On November 25, 2002 former Defendant Princess Beverly filed its notice of filing of bankruptcy, which triggered the automatic stay provisions of 11 U.S.C. § 362. Appellant Hoover's present counsel filed his Notice of Appearance on August 13, 2003. The circuit court entered an Agreed Order on March 29, 2004, dismissing Princess Beverly from this civil action, with prejudice.

On August 16, 2006, Appellant Hoover noticed for hearing the Motion to Dismiss filed jointly by Appellee Peter K. Moran and Princess Beverly in 2002. Appellee Moran filed a "supplement" to the Motion to Dismiss on November 9, 2006. A hearing was held on the Motion to Dismiss on November 20, 2006, wherein the circuit court, "exercising the discretion conferred by Rule 12, elected to exclude all matters outside the pleadings from consideration in relation to the Motion." (*See* Order, December 8, 2006, 1) In granting Appellee Moran's Motion to Dismiss, the circuit court's Order further provided, as follows:

> The Court has considered all written submissions and oral arguments of counsel and has conducted a thorough review of the Complaint, assuming the allegations therein to be true. After this review, the Court finds no allegations in the Complaint against Peter Moran as an individual, and therefore grants the Motion to Dismiss.

On December 13, 2006, Appellant Hoover filed his "Motion of Johnnie Hoover For Reconsideration of Order Granting Defendant, Peter K. Moran's Motion to Dismiss," asserting that there were "many allegations in the complaint against Peter K. Moran as an individual in that he was named as one of the 'defendants.'" Appellant Johnnie Hoover appealed the Order, filed January 2, 2007, wherein

the Circuit Court of Kanawha County, the Honorable Irene C. Berger presiding, denied Appellant Hoover's Motion for Reconsideration. Subsequently, this Court granted Appellant Hoover's Petition for Appeal by Order filed June 8, 2007. Pursuant to that Order, Appellant Hoover submits herein his Brief, respectfully requesting that this Honorable Court reverse the decision of the Circuit Court of Kanawha County.

III. ASSIGNMENT OF ERROR

Whether the Circuit Court of Kanawha County committed reversible error in summarily dismissing Appellant Hoover's Complaint, based on a clearly erroneous finding of "no allegations in the Complaint against Peter Moran as an individual."

RULING: The Circuit Court granted Appellee Moran's Motion to Dismiss, which dismissed the Complaint against Appellee Moran and dismissed the action from the court's docket.

IV. STANDARD OF REVIEW

Appellate review of a circuit court's order granting a motion to dismiss a complaint is *de novo*. *See State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 461 S. E.2d 516 (W. Va. 1995) and *Savilla v. Speedway SuperAmerica, LLC*, 639 S. E. 2d 850, 854 (W.Va. 2006), citing *Kopelman & Associates v. Collins*, 473 S. E. 2d 910, 913 (W.Va. 1996).

This Court exercises plenary review over a circuit court's decision to grant either a motion to dismiss or a summary judgment. *See Conrad v. ARA Szabo*, 480 S. E. 2d 801 (W. Va. 1996).

V. POINTS AND AUTHORITIES RELIED UPON

CASES

Caflisch Lumber Co. v. Lake Lynn Lumber & Supply Co.,
195 S. E. 854 (W. Va. 1938) 21

Chapman v. Kane Transfer Co.,
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Conley v. Gibson,
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483 S. E. 2d 48 (W.Va. 1996) 25

Frasher v. Frasher,
249 S. E. 2d 513 (W. Va. 1978) 17

Glass v. Hulbert,
102 Mass. 24, 3 Am. Rep. 418 (1869) 18

Gray v. Edgewater Landing Inc.,
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John W. Lodge Distr. Co., Inc. v. Texaco, Inc.,
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Ross v. Midelberg,
42 S. E. 2d 185 (W. Va. 1947) 18

Sanders v. Roselawn Memorial Gardens, Inc.,
159 S. E. 2d 784 (W. Va. 1968) 21

Savilla v. Speedway SuperAmerica, LLC,
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Southern Electrical Supply Co. v. Raleigh County National Bank,
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Southern States Cooperative, Inc. v. Dailey,
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484 S.E.2d 481 (W. Va. 1997) 25

Stump v. Harold,
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300 S. E. 2d 295 (W. Va. 1983) 17

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185 S. E. 845 (W. Va. 1936) 21

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266 F. Supp. 651 (N. D. W. Va. 1967) 15

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STATUTES

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MISCELLANEOUS

J. Jarrod Jordan, *"Piercing the Corporate Veil in West Virginia: The Extension of Laya to All Sophisticated Commercial Entities,"* 109 W.Va. L. Rev. 141 (2006) 19-20

1 W. Fletcher, *Cyclopedia of the Law of Private Corporations*, §§ 41, 41.10, 41.20, 41.25, 44.1 (rev. perm. ed. 1983) 21-23

Stockholder's Personal Conduct of Operations or Management of Assets as Factor Justifying Disregard of Corporate Entity, 46 A .L. R. 3d 428 (1972) 21

18 Am. Jur. 2d *Corporations* §§ 43-45 (1985) 21

18 C. J. S. *Corporations* §§ 6-7 (1939) 21

VI. ARGUMENT

A. DISMISSAL OF THE COMPLAINT AGAINST APPELLEE PETER K. MORAN BASED ON A FINDING THAT THERE WERE "NO ALLEGATIONS IN THE COMPLAINT AGAINST PETER MORAN AS AN INDIVIDUAL" IS CLEARLY ERRONEOUS AND MUST BE REVERSED ON APPEAL

The Circuit Court of Kanawha County entered an Order on December 8, 2006, granting Appellee Moran's Motion to Dismiss pursuant to its spare and further unarticulated finding of "no allegations in the Complaint against Peter Moran as an individual." In light of the circuit court's clear error in rendering this precipitous decision, Appellant Hoover filed his "Motion of Johnnie Hoover For Reconsideration of Order Granting Defendant, Peter K. Moran's Motion to Dismiss" on December 13, 2006, directing the circuit court's attention to "many allegations in the complaint against Peter K. Moran as an individual." Nevertheless, the circuit court denied Appellant Hoover's Motion for Reconsideration by Order filed January 2, 2007, without further explanation of its decision.

This Court's *de novo* review of Appellant Hoover's Complaint will reveal the fallacious nature of the circuit court's ruling, where a simple reading of the language of the Complaint shows substantial allegations against Appellee Moran, as an individual, in that he was named as one of the "defendants" in the civil action, to wit:

> 7. These loans and purchases made by the plaintiff for the benefit of the **defendants** were made by the plaintiff in material part because of his reliance upon **defendants'** promise that he owned 10% interest in defendant Princess Beverly Coal Company, and if ever sold, he would receive 10% of its net sale proceeds.
>
> 8. As a result of the various loans and financial support made by the plaintiff to the **defendants**, and the promise made by the **defendants** to the plaintiff, plaintiff had reason to believe, and did in fact did believe, that he had a 10 % equitable interest in Princess Beverly Coal Company . . .

9. On February 13, 1997, **defendant Peter Moran, in his own behalf and as President of defendant Princess Beverly Coal Company,** entered into negotiations with plaintiff to satisfy him with his claim of his equitable interest in the Coal Company, which offer was never finalized or reduced to writing and signed by the parties.

11. **Defendants** breached **their** agreement with the plaintiff, made in 1985, as aforesaid, by failing to account to the plaintiff the terms of the sale of Princess Beverly Coal Company, and to render an accounting to him as to his share of the sale proceeds.

12. As a direct and proximate result of **defendants' breach of their agreement** to the plaintiff, plaintiff has been damaged in an unspecified amount, which breach occurred on or about February 18, 1999 and has continued thereafter.

See Complaint (Emphasis added)

Moreover, in his Complaint, Appellant Hoover requested that "he be awarded judgment **against defendants jointly and severally** . . . that the Court order the **defendants to account to the plaintiff** the terms of the sale of the assets of Princess Beverly Coal Company to Addington Enterprises, Inc., . . . that he **have judgment against the defendants** in the amount of 10% of the net sale proceeds of said Princess Beverly Coal Company . . ." *Id.* (Emphasis added)

Therefore, this Court must reverse the circuit court's Order, rendered January 2, 2007, which upon reconsideration granted Appellee Moran's Motion to Dismiss, in that the circuit court's finding that there were "no allegations in the Complaint against Peter Moran as an individual" was clearly in error, as a *de novo* review of the Complaint and further consideration of Appellant Hoover's arguments herein shall reveal.

B. IN GRANTING APPELLEE MORAN'S MOTION TO DISMISS, THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR IN THAT APPELLANT HOOVER'S COMPLAINT STATES A CLAIM UPON WHICH RELIEF CAN BE GRANTED PURSUANT TO RULE 12(b)(6) OF THE WEST VIRGINIA RULES OF CIVIL PROCEDURE.

1. Appellant Hoover's Complaint Meets Standard Required to Overcome a Motion to Dismiss

> The trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.
>
> *John W. Lodge Distr. Co., Inc. v. Texaco, Inc.*, 245 S. E. 2d 157, 159 (W. Va. 1978), citing Syl. Pt. 3, *Chapman v. Kane Transfer Co.*, 236 S. E. 2d 207 (W. Va. 1977), (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957).

This Court further provided in *Lodge, supra,* that "[t]he standard which plaintiff must meet to overcome a Rule 12(b)(6) motion is a liberal standard, and few complaints fail to meet it. The plaintiff's burden in resisting a motion to dismiss is a relatively light one." *Lodge* at 159, citing *Williams v. Wheeling Steel Corp.*, 266 F. Supp. 651 (N.D. W. Va. 1967)

In addition, citing the policy underlying the West Virginia Rules of Civil Procedure favoring the determination of lawsuits on their merits, this Court further stated in *Lodge* that "if the complaint states a claim upon which relief can be granted under any legal theory, a motion under Rule 12(b)(6) must be denied." *Id.*, citing *United States Fidelity & Guaranty Co. v. Eades,* 144 S. E. 2d 703 (W. Va. 1965). Moreover, the Court stated in *Lodge* that "for the purposes of the motion to dismiss, the complaint is construed in the light most favorable to the plaintiff, and its allegations are to be taken as true." *Id.* at 158.

Appellant Hoover's legal theories and claims for relief sound in contract and are based on the following assertions: (a) that Appellee Moran induced Appellant Hoover to enter into an agreement in April,

1985, wherein Appellant Hoover used his own personal funds and credit to make loans to Appellee Moran and former Defendant Princess Beverly Coal Company and to purchase parts, materials, services and equipment for use in Princess Beverly's business operations in exchange for Appellee Moran's promise that Appellant Hoover would receive 10 percent of the sale price when the company was sold; (b) that this agreement constituted a valid oral contract between Appellant Hoover, Appellee Moran and Princess Beverly; (c) that Appellant Hoover fully performed his side of the agreement; (d) that Appellee Moran and Princess Beverly accepted the benefit of Appellant Hoover's performance under the agreement for a period of approximately ten years; (e) that Appellee Moran and Princess Beverly are estopped by their own conduct from denying that a valid oral contract existed; and (f) that the agreement was breached when Princess Beverly was sold in February, 1999 and Appellee Moran and Princess Beverly failed and/or refused to pay Appellant Hoover 10 percent of the sale price.

2. The Statute of Frauds is Not Applicable Herein, But Even if This Court Finds the Statute of Frauds to be Applicable, Appellee Moran Is Estopped From Asserting the Statute as a Defense

The oral agreement at the heart of Appellant Hoover's Complaint did not concern an exchange of stock in Princess Beverly in exchange for Appellant Hoover's financial assistance; rather, Appellee Moran's offer was for Appellant Hoover to receive an equitable interest in the company, i.e., 10 percent of the sale price when the company was sold, in exchange for Appellant Hoover's substantial financial help. Thus, any responsive argument that Appellee Moran may offer asserting that the oral contract in this case must comply with the Statute of Frauds because it involved the sale of securities is without merit.

Another possible argument that may be offered by Appellee Moran is that the oral agreement falls within the Statute of Frauds because the agreement was not performed within one year and is, for that

reason unenforceable. That argument is likewise without merit. This Court stated in Syllabus Pts. 1 and 2, *Thompson v. Stuckey*, 300 S. E. 2d 295 (W. Va. 1983), as follows:

> 1. An oral contract under terms of which whole performance is possible within a year from date contract was entered into is not within statute of frauds. *Jones v. Shipley*, 122 W. Va. 65, 7 S. E. 2d 346 (1940).
>
> 2. A plaintiff seeking to avoid the condemnation of his parole evidence through the "capable of performance" exception to the statute of frauds, W. Va. Code, 55-1-1(f) [1923], must show clear and convincing evidence that the contract actually exists before a court may submit the plaintiff's claim to a jury.

The Court recognized in *Thompson* that the requisite "evidence that the contract actually exists" may include "circumstantial evidence, apparent reliance, similar practices of the defendant in particular or of the industry in general in similar situations, or anything else that will convince the court that the defendant has been protected from an utterly spurious claim." *Id.* at 299.

At this stage of the lawsuit, there are numerous factual issues yet to be developed through discovery, including witness testimony through depositions and production of financial records. However, even at this stage, Appellant Hoover is able to show apparent reliance on the oral agreement through his actions of using his own personal funds and credit to make loans to Appellee Moran and Princess Beverly and to purchase parts, materials, services and equipment for use in Princess Beverly's business operations. Furthermore, Appellant Hoover is also able to show that Appellee Moran apparently relied on the agreement by his acceptance of Appellant Hoover's performance and by his 1997 settlement offer.

Nevertheless, even if the Court finds that the Statute of Frauds is applicable to the facts of this case, Appellee Moran is estopped by his own actions in raising the statute as a defense pursuant to West Virginia law. This Court stated in *Frasher v. Frasher*, 249 S. E. 2d 513, 516 (W. Va. 1978) that "[w]e have

followed the general rule that where one party fully performs on an agreement that would otherwise be barred by the Statute of Frauds, he is entitled to sue the other party for performance." *See also Stump v. Harold*, 23 S. E.2d 656, 659 (W. Va. 1942): "We regard it as unnecessary to cite authority to sustain the broad statement that full performance on the part of the person offering to prove an understanding relieves that understanding from the effect of the Statute of Frauds . . . , and that, therefore, if otherwise permissible, it may be established by oral testimony."

Furthermore, the Court provided the following comments in *Ross v. Midelberg*, 42 S. E. 2d 185, 191-192 (W. Va. 1947) which are relevant to this Court's analysis:

> It is a broad general rule that a court of equity will not permit a party to take shelter under the defense of a statute and by so doing commit a fraud on the other party. . . . "The fraud most commonly treated as taking an agreement out of the statute of frauds is that which consists in setting up the statute against its enforcement, after the other party has been induced to make expenditures, or a change of situation in regard to the subject-matter of the agreement, or upon the supposition that it was to be carried into execution, and the assumption of rights thereby to be acquired; so that the refusal to complete the execution of the agreement is not merely a denial of rights which it was intended to confer, but the infliction of an unjust and unconscientious injury and loss. In such case, the party is held, by force of his acts or silent acquiescence, which have misled the other to his harm, to be estopped from setting up the statute of frauds." (quoting *Glass v. Hulbert*, 102 Mass. 24, 35, 3 Am. Rep. 418)

C. APPELLEE MORAN, AS THE SHAREHOLDER "ACTIVELY PARTICIPATING IN THE OPERATION" OF PRINCESS BEVERLY COAL COMPANY, MUST BE HELD INDIVIDUALLY AND PERSONALLY LIABLE FOR BREACH OF THE CONTRACT WITH APPELLANT HOOVER PURSUANT TO THE EQUITABLE REMEDY OF PIERCING THE CORPORATE VEIL

The lower tribunal's erroneous decision to dismiss the Complaint allows Appellee Moran to escape providing Appellant Hoover with the equitable remedies to which he is clearly entitled, pursuant to *Laya v. Erin Homes, Inc.*, 352 S. E. 2d 93 (W. Va. 1986).

The case *sub judice* presents the appropriate circumstances whereby "the corporate entity may be disregarded to remove the barrier to personal liability" of Appellee Moran – the shareholder "actively participating in the operation of the business" pursuant to *Laya, supra.* As stated in Appellant Hoover's Complaint, Appellee Moran was President and Chief Executive Officer of Princess Beverly Coal Company during all or most of the time Appellant Hoover was its employee. *See* Complaint, ¶ 3. A discussion of this Court's decision in *Laya* is germane to the *de novo* analysis herein.

Laya is the seminal case regarding piercing the corporate veil to hold shareholders individually liable under a contract claim in West Virginia. *See generally* J. Jarrod Jordan, *"Piercing the Corporate Veil in West Virginia: The Extension of Laya to All Sophisticated Commercial Entities,"* 109 W. Va. L. Rev. 141 (2006).[6] As explained in this comprehensive article, "piercing the corporate veil is the concept of disregarding the formal and distinct existence of the corporate legal fiction and holding its shareholders

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[6] West Virginia Code § 31D-6-622(b) (2002) provides that "[u]nless otherwise provided in the articles of incorporation, a shareholder of a corporation is not personally liable for the acts or debts of the corporation **except that he or she may become personally liable by reason of his or her own acts or conduct.**" (Emphasis added)

personally liable for corporate debts." *Id.* at 148. The commentator states that "[p]iercing began as an equitable remedy, and it has grown into a complex and vital common law doctrine." *Id.* at 150. (Footnotes omitted)

Appellant Hoover asserts that equity requires that the corporate entity be disregarded in this case to make the real party in interest, Appellee Moran, the individual actor, liable herein. Interestingly, in "Defendant, Princess Beverly Coal Company's Reply to Plaintiff's Response to Defendants' Motion to Dismiss," the former litigant agrees that Appellant Hoover's remedy lies, at least in part, with Appellee Moran, asserting as follows:

> Princess Beverly received none of the proceeds from the February 1999 stock stale challenged by the Plaintiff. Instead, the proceeds went to Mr. Moran and the other shareholders and it is with them, if at all, that the Plaintiff's recourse lies. . . . Further, the Plaintiff's Complaint demonstrates that any purported oral agreement, whether relating to the transfer of stock, stock proceeds, or otherwise, was between the Plaintiff and Mr. Moran, not Princess Beverly. Princess Beverly received none of the proceeds from the sale of its outstanding stock The proceeds were paid to Mr. Moran and the other shareholders. Thus, the Plaintiff's remedy is with *Mr. Moran* and the other shareholders who received the proceeds which Plaintiff claims are partially his.[7] (Emphasis in Original)

The *Laya* Court stated that "[u]nder exceptional circumstances, the corporate entity may be disregarded to remove the barrier to personal liability of the shareholder(s) actively participating in the operation of the business." *Id.* at 97. Quoting *Southern States Cooperative, Inc. v. Dailey*, 280 S. E.2d 821, 827 (W. Va. 1981), the Court further provided: "Justice may require that courts look beyond the bare legal relationship of the parties to prevent the corporate form from being used to perpetrate injustice, defeat

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[7] *Id.*, 9. *See* also 109 W. Va. L. Rev. 141, 148 (2006), *supra*: "The corporate veil generally will be pierced when 'a court determines that the debt in question is not really a debt of the corporation, but ought, in fairness, to be viewed as a debt of the individual or corporate shareholder or shareholders.'" (Citation omitted)

public convenience or justify wrong. However, the corporate form will never be disregarded lightly."[8] *Id.*

The Court further stated in *Laya* that "this Court expressed the principle of 'piercing the corporate veil' in the following manner in syllabus point 10 of *Sanders v. Roselawn Memorial Gardens, [Inc.]* 152 W. Va. 91, 159 S. E. 2d 784 (1968):"

> While, legally speaking, a corporation constitutes an entity separate and apart from the persons who own it, such is a fiction of the law introduced for purpose of convenience and to subserve the ends of justice; and it is now well settled, as a general principle, that the fiction should be disregarded when it is urged with an intent not within its reason and purpose, and in such a way that its retention would produce injustices or inequitable consequences.
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> *Accord, Southern Electrical Supply Co. v. Raleigh County National Bank*, __ W. Va. __, ___, 320 S. E. 2d 515, 521-22 (1984); syl. pt. 4, *Caflisch Lumber Co. v. Lake Lynn Lumber & Supply Co.*, 119 W. Va. 668, 195 S. E. 854 (1938); syl. pt. 4, *Tynes v. Shore*, 117 W. Va. 355, 185 S. E. 845 (1936). *See generally* 1 W. Fletcher, *Cyclopedia of the Law of Private Corporations* §§ 41, 41.10, 41.20 (rev. perm. ed. 1983); annotation, *Stockholder's Personal Conduct of Operations or Management of Assets as Factor Justifying Disregard of Corporate Entity,* 46 A. L .R. 3d 428 (1972); 18 Am. Jur. 2d *Corporations* §§ 43-45 (1985); 18 C. J. S. *Corporations* §§ 6-7 (1939). (*See* Syllabus Pt. 2, *Laya*)
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> "Piercing the corporate veil" is an equitable remedy, the propriety of which must be examined on an *ad hoc* basis. *See* 1 W. Fletcher, *Cyclopedia of the Law of Private*

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[8] *See* Syllabus Pt. 3, *Mills v. USA Mobile Communications, Inc.*, 438 S.E.2d 1 (W.Va. 1993), which states: "The corporate entity may be disregarded in those situations where the corporate form is being used to perpetrate injustice, defeat public convenience, or justify wrongful or inequitable conduct." The *Mills* Court further provided: "We do not hold that the corporate entity may never be disregarded in a contract action. As the Mississippi Supreme Court recognized in *Gray v. Edgewater Landing, Inc.*, . . . , the corporate veil may be pierced if,

> "the complaining party . . . demonstrates: (a) some frustration of contractual expectations regarding the party to whom he looked for performance; (b) the flagrant disregard of corporate formalities by the defendant corporation and its principals; (c) a demonstration of fraud or other equivalent misfeasance on the part of the corporate shareholder." (Citations omitted)

Mills at 14, quoting *Gray v. Edgewater Landing, Inc.*, 541 So.2d 1044, 1047 (Miss. 1989).

Corporations § 41.25 (rev. perm. ed. 1983). "Decisions to look beyond, inside and through corporate facades must be made case-by-case, with particular attention to factual details." *Southern Electrical Supply Co. v. Raleigh County National Bank*, __ W. Va. __, ___, 320 S. E. 2d 515, 523 (1984).

Laya at 97-98.

Furthermore, this Court stated in *Laya* that in a case involving an alleged breach of contract – such as the instant matter – there is a two-pronged test to pierce the corporate veil "in order to hold the shareholder(s) actively participating in the operation of the business personally liable for such breach to the party who entered into the contract with the corporation."[9] *Id.* at 99. The Court described this test as follows:

(1) there must be such unity of interest and ownership that the separate personalities of the corporation and of the individual shareholder(s) no longer exist (a disregard of the formalities requirement) and

(2) an inequitable result would occur if the acts are treated as those of the corporation alone (a fairness requirement).

Id. (*See* Syllabus Pt. 3)

With regard to the first prong of the test, the Court in *Laya* referenced factors that it had set forth previously in its decision that were to be considered in deciding whether to pierce the corporate veil. The Court stated, as follows: "Most of the numerous factors listed previously are pertinent primarily to the disregard of formalities requirement, not because it is the more important requirement – it is not – but because it is easier to compile a list of typical corporate formalities than to anticipate and list types of

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[9] The Court also described a possible "third prong" to the test for "certain types, of contract creditors of the corporation, specifically, those capable of protecting themselves," such as a "bank or other lending institution." *Id.* at 100. This "third prong" obviously does not apply to the case *sub judice*.

inequitable and unfair consequences which could result from not piercing the corporate veil in a given case." *Id.*

Of particular relevance to this discussion is the *Laya* Court's reference to "[a]n often quoted statement of the vital importance of grossly inadequate capitalization as a factor in determining whether to pierce the corporate veil." Quoting 1 W. Fletcher, *Cyclopedia of the Law of Private Corporations* § 44.1 (rev. perm. ed. 1983) (footnotes omitted), the Court provided at Footnote 7, as follows:

> If a corporation is organized and carries on a business without substantial capital in such a way that the corporation is likely to have insufficient assets available to meet its debts, it is inequitable that the stockholders should set up such a flimsy organization to escape personal liability. The attempt to do corporate business without providing any sufficient basis of financial responsibilities to creditors is an abuse of the separate entity and will be ineffectual to exempt the stockholders from corporate debts. It is coming to be recognized as the policy of the law that stockholders should in good faith put at the risk of the business unencumbered capital reasonably adequate for its prospective liabilities. If the capital is illusory or trifling compared with the business to be done and the risks of loss, this is ground for denying the separate entity privilege. It has been stated that a corporation's capitalization is a major consideration of courts in deciding whether a legitimate separate corporate entity was maintained.
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> *Id.* at 101

The factual narrative of this case, set out in Section II of this Petition, details the "grossly inadequate" financial condition of the coal company at the time Appellant Hoover entered into an oral agreement with Appellee Moran to help keep the company afloat. Indeed, Appellant Hoover asserts that "but for his acts in using his personal funds to purchase parts, equipment and services to make loans, all of which acts were solely for the benefit of the company, the company would not have been able to stay in business." (*See* "Plaintiff's Response To And Memorandum In Opposition To Defendants' Motion To Dismiss," Plaintiff's Affidavit, ¶ 19.)

It is particularly inequitable, if not egregious, that Appellee Moran benefitted handsomely from this business relationship with Appellant Hoover, whereas Appellant Hoover was left with nothing for his extensive investment of time and substantial funding to the ultimately profitable enterprise. Importantly, the *Laya* Court stated:

> Close corporations are closely scrutinized to determine whether the corporate veil should be pierced. (Citation omitted) One of the principal reasons for this close scrutiny of close corporations is that grossly inadequate capitalization is more likely to occur in a close corporation than in a corporation whose shares are publicly traded, and grossly inadequate capitalization is a very important factor, as an element of the fairness prong, in determining whether to pierce the corporate veil. "One fact which all the authorities consider significant in the inquiry [of whether to pierce the corporate veil], and particularly so in the case of the one-man or closely-held corporation, is whether the corporation was grossly undercapitalized for the purposes of the corporate undertaking." (Citation omitted) An obvious inadequacy of capital, measured by the nature and magnitude of the corporate undertaking, has . . . frequently been an important factor in cases denying shareholders their defense of limited liability. (Citations omitted)
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> *Id.* at 100-101.

The *Laya* Court further provided in Footnote 7 of the decision that "[s]everal of the commentators suggest that grossly inadequate capitalization *per se* should be sufficient to pierce the corporate veil, except when a contract creditor capable of protecting itself assumes the risk." *Id.* at 101 (citations omitted).[10] The Court provided in Syllabus Pt. 4, *Laya*, as follows: "Generally, the presumption is that the party dealing with the corporation did not assume the risk of grossly inadequate capitalization."

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10 The Court provided in Syllabus Pt. 5 of *Laya*, as follows: "Grossly inadequate capitalization combined with disregard of corporate formalities, causing basic unfairness, are sufficient to pierce the corporate veil in order to hold the shareholder(s) actively participating in the operation of the business personally liable for a breach of contract to the party who entered into the contract with the corporation."

This Court has followed *Laya* since the seminal decision was issued in 1986. In *Dieter Engineering Services, Inc. v. Parkland Development, Inc.*, 483 S. E. 2d 48 (W. Va. 1996), this Court held in a breach of contract action that the Randolph County circuit court did not err in piercing the corporate veil and holding that the individual shareholders were personally liable for the corporation's debt. The *Dieter* Court examined the numerous relevant factors in the "totality of circumstances' test," finding that fifteen of the nineteen factors listed in *Laya, supra,* "should be construed in favor of piercing the corporate veil." *Id.* at 60. The Court stated: "[T]here is evidence of factor 8, the failure to adequately capitalize a corporation for the reasonable risks of the corporate undertaking which supports piercing the corporate veil. In *Laya*, we made clear that this was one of the most significant factors in determining whether the corporate veil should be pierced." *Id.*

Finally, the *Laya* Court dealt with a motion for summary judgment, whereas in the instant matter, the issue at bar concerns the circuit court's erroneous dismissal of Appellant Hoover's Complaint pursuant to Appellee Moran's Motion to Dismiss. Syllabus Pt. 6 of *Laya* states as follows: "The propriety of piercing the corporate veil should rarely be determined upon a motion for summary judgment. Instead, the propriety of piercing the corporate veil usually involves numerous questions of fact for the trier of facts to determine upon all of the evidence." *See St. Peter v. Ampak-Division of Gatewood Products, Inc.*, 484 S.E.2d 481 (W.Va. 1997) which stated, citing Syllabus Pt. 6 of *Laya*, that "[t]he numerous issues of fact present in determining whether to pierce the corporate veil, led us to caution against deciding this issue on summary judgment."

Accordingly, issues involving the propriety of piercing the corporate veil pursuant to the case *sub judice* likewise should not be determined upon a motion to dismiss, given the "liberal standard" that a plaintiff must meet in order to overcome a Rule 12(b)(6) motion. *See Lodge, supra,* at 159.

VII. CONCLUSION

Therefore, based on the argument and authorities discussed above, Appellant Johnnie Hoover respectfully requests that the Order of the Circuit Court of Kanawha County, rendered January 2, 2007, granting Appellee's Motion to Dismiss, be reversed by this Honorable Court.

Respectfully Submitted,
JOHNNIE HOOVER
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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JOHNNIE HOOVER,

Appellant,
Plaintiff below,

v.

Appeal from the Circuit Court of
Kanawha County, West Virginia
Civil Action No. 02-C-1058

PETER K. MORAN,

Appellee,
Defendants.

CERTIFICATE OF SERVICE

I, STEPHEN P. MEYER, counsel for the appellant, does hereby certify that true and exact copies of the foregoing **Brief on Behalf of Appellant Johnnie Hoover**, was served upon the following by first class mail, postage prepaid, on August 31, 2007.

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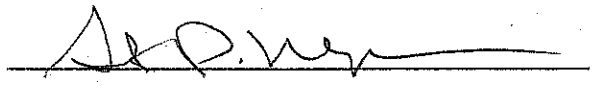

STEPHEN P. MEYER [WVSB #2541]